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# Senators *Can't* Sue Their Health Plans

## Senate Republican Patients' Bill of Rights Won't Change Current Policy

As a result of the current managed care debate in Congress, a great misunderstanding has developed, which is patently untrue: that Senators and Representatives in Congress can sue their health care plans for damages. In fact, the opposite is closer to the truth: Senators and Representatives have *less* legal recourse than other Americans in private employer-sponsored health plans. This is the current policy, and nothing in any major legislation being considered by Congress — much less in the Senate Republican Patients' Bill of Rights, S. 2330 — would change this.

- **Senators and members of Congress have *less* of a right to sue their health plans than those in private employer-provided plans.**
- **Nothing in the Senate Republican Patients' Bill of Rights, S. 2330, would expand or alter Senators' or Representatives' right to sue in any way.**
- **The goal of the Republican Patients' Bill of Rights, S. 2330, remains: expand access to private health insurance; extend basic managed care patient protections; and put treatment above trials.**

Here's the real story.

***Federal regulations prohibit federal employees — including Senators and Representatives — from suing their health insurance companies.***

- On April 5, 1996, the ***Clinton Administration's*** Office of Personnel Management (OPM) published a regulation that ***prohibited federal employees from suing their health plans***, requiring them instead to sue OPM.
- The regulation reads in part: "A legal action to review final action by OPM involving such denial of health benefits must be brought against OPM and ***not against the carrier or carrier's subcontractors.***" *(5 CFR 890.107(c))*

- Prior to that regulation, federal employees sued their health insurance companies (referred to as "carriers" in the regulation) rather than OPM when they were denied coverage of a health benefit *(see 61 CFR 15177)*.

***Federal employees who sue OPM can recover only the amount of the denied claim. They cannot sue for consequential or punitive damages.***

- The same regulation stipulates: "The recovery in such a suit shall be limited to a court order directing OPM to require the carrier to pay the amount of benefits in dispute." *(5 CFR 890.107(c))*

- Before promulgating this final regulation, OPM published this regulation in interim form (March 29, 1995) and sought public comment. Two commenters urged the agency to revise the regulation to: (1) allow the Federal Employees Health Benefits (FEHB) plans to be sued in state courts; (2) allow federal employees to recover monetary compensation for damages incurred as a result of a denial of benefits; and (3) to allow federal employees to sue their health insurance companies instead of appealing claim denials to OPM.

- *OPM specifically rejected these comments.* Their response reads: "OPM's regulations have never offered such 'rights.' The interim regulations simply clarified that these opportunities are not available to covered individuals under the FEHB program. The FEHB law includes a provision specifically stating that FEHB contract provisions that relate to the extent of coverage or benefits supersede and preempt any State law that relates to health insurance or plans to the extent that such law is inconsistent with FEHB contractual provisions. Therefore, we believe the interim regulations accurately reflect the intent of the FEHB law." *(61 FR 15177f, April 5, 1996)*

***The brochure for every Senator and Representative in Congress (and every federal employee) specifically states that they cannot sue their health insurance company.***

- For example, page 38 of the 1998 Blue Cross and Blue Shield Service Benefit Plan brochure for federal employees (and Members of Congress) states:

  "Federal law exclusively governs all claims for relief in a lawsuit that relates to this Plan's benefits or coverage or payments with respect to benefits. Judicial action on such claims is limited to the record that was before OPM when it rendered its decision affirming the Carrier's denial of the benefit. The recovery in such a suit is limited to the amount of benefits in dispute."

***These rights are actually less extensive than those afforded to people enrolled in plans sponsored by private employers.***

- Federal pension law (ERISA) holds health plans accountable for their coverage decisions through internal appeals and, once those appeals are exhausted, in federal or state courts. In such cases, ERISA would allow plaintiffs to be awarded attorney fees as well as the cost of the denied benefit.

- The OPM regulation does *not* provide for federal employees to be awarded attorney fees.

***None of the major health care proposals would extend to Senators and Representatives the right to sue their health plans. In recent years, however, federal courts have ruled that health plans sponsored by private employers can be held liable for punitive and compensatory damages for medical malpractice.***

- Federal courts have ruled numerous times — at least 15 times since 1995 — that ERISA plans can be sued for medical malpractice.

- Increasingly, judges have distinguished between administering benefits and delivering quality health care.

- In some cases, they have found that staff-model HMOs are wholly responsible for the negligence of their staff physicians. In others, they have held health plans "vicariously liable" for the negligence of non-employee physicians, particularly if the plan has advertised or otherwise represented itself as assuring the quality of its provider network. In such cases, the courts have held health insurers liable for more than just the cost of a denied benefit, requiring them to pay punitive and compensatory damages as well. These courts have held that while ERISA preempts state laws involving lawsuits over benefits coverage and the administration of such benefits, it does not preempt lawsuits based on the delivery and quality of care.

- Yet despite this trend in the courts, Senators' and Representatives' rights have not and will not expand to keep pace. None of the major health care bills pending in Congress — not the House-passed bill, not the Kennedy bill, not the Senate GOP Patients' Bill of Rights — proposes extending to Senators and Representatives the right to sue their health plans.

***Indeed, Senators, Representatives, and federal workers don't have special rights, but rather they have <u>fewer</u> rights than people enrolled in private health plans.***

- On May 7 of this year, a U.S. District Court in Pennsylvania allowed a lawsuit against an FEHB plan based on "vicarious liability" to go forward *(Negron v. Patel, E.D. Pa., 97-4366, May 7, 1998).*

- While this case is still being litigated, it may ultimately result in federal employees being granted the same ability to sue their health plans for medical malpractice that people enrolled in private health plans currently do.

***S. 2330 does not change the law regarding medical malpractice suits against HMOs, whether privately or federally sponsored.***

- The Republican bill does not bar such lawsuits; nor does it expand such lawsuits.

- The Kennedy bill creates 56 new causes of action — 56 new reasons to sue people.

  These lawsuits can be brought against HMOs, companies that administer claims for employers, and against employers themselves.

  It is a "Lawyers' Right to Bill" bill, a bonanza for trial lawyers that will make health insurance less affordable and induce many employers to drop coverage of their employees altogether.

***The Senate Republican bill relies on doctors, not lawyers or insurance company accountants, to assure that patients get the medical care they're entitled to.***

- The GOP bill relies on independent, expedited and binding review by outside medical experts — not on lawsuits — to protect patients' rights.

- It guarantees patients treatment, not trials. Instead of getting lawyers involved after harm is done, the GOP bill gets doctors involved to prevent harm from being done.

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